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IN THE COURT OF APPEALS OF INDIANA

BENNY LUCAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 85A02-0703-CR-258
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WABASH SUPERIOR COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-0410-FB-117

August 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

A jury found Benny Lucas guilty of dealing in a schedule II controlled substance, a Class B felony, and determined that he was an habitual substance offender. The trial court sentenced Lucas to eleven years and enhanced the sentence by three years for his status as an habitual substance offender. Lucas now appeals, arguing that the admission of a deposition violated his Sixth Amendment right to confront the witnesses against him, and that the three-year enhancement for his status as an habitual substance offender is inappropriate given the nature of his offenses and his character. Concluding that the admission of the deposition did not violate Lucas's Sixth Amendment rights and that the enhancement is not inappropriate, we affirm.

Facts and Procedural History

Sometime during either August or September of 2004, Kelly Acosta was arrested and charged with aiding in dealing of some sort of controlled substance.[1] Pursuant to a verbal agreement with members of the Wabash County Drug Task Force, Acosta agreed to participate in controlled buys in exchange for leniency. On September 8, 2004, Acosta went to Lucas's home and purchased three eighty-milligram oxycodone pills from Lucas. Acosta wore a wire, and the conversation between Acosta and Lucas was recorded and monitored by Officers Nick Brubaker and Matthew Rebholz, of the Wabash City Police Department. On October 7, 2004, the State charged Lucas with dealing in a schedule II controlled substance. On October 28, 2004, the State filed an information alleging that Lucas was an habitual

substance offender based on two previous convictions for operating a vehicle while intoxicated.

On January 26, 2006, Lucas's attorney deposed Acosta. The prosecutor was at this deposition but did not ask Acosta any questions. On March 4, 2006, Acosta died. On July 3, 2006, Lucas filed a motion in limine seeking to exclude the deposition. The trial court held a hearing and denied the motion. A jury trial took place on October 26 and 27, 2006. At trial, the State introduced a redacted[2] version of the deposition and read it to the jury. Lucas objected to the admission of this evidence at all relevant times. Officers Brubaker and Rebholz also testified that they had searched Acosta prior to the controlled buy, and visually monitored her from the time they searched her until she entered Lucas's home and from the time she left Lucas's home until she met with the officers and gave them the pills. The officers also listened to the conversation between Lucas and Acosta via Acosta's wire. This recorded conversation, in which Lucas and Acosta discussed the price of the pills and how to ingest them, was also played for the jury.

The jury found Lucas guilty of dealing a schedule II controlled substance, and in a separate proceeding, determined he was an habitual substance offender. The trial court entered judgments of conviction accordingly. On November 22, 2006, the trial court held a sentencing hearing. At the hearing, the trial court found Lucas's criminal history to be an aggravating factor, and the fact that Lucas's imprisonment would cause undue hardship to his

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[1] Acosta stated that she was charged with a Class B felony for "aiding in drug dealing." Transcript at 103. The record does not disclose the precise offense with which she was charged.

[2] Portions of the deposition that related to uncharged acts were not presented to the jury.

wife to be a mitigating factor. The trial court determined that the aggravating circumstance outweighed the mitigating circumstance and sentenced Lucas to an enhanced sentence[3] of eleven years[4] for dealing in a schedule II controlled substance, enhanced by three years because of his status as an habitual substance offender. Lucas now appeals his convictions[5] and sentence.

Discussion and Decision

I. The Confrontation Clause

A. Standard of Review

The admission of evidence is generally a matter that rests within the sound discretion of the trial court and is an issue that we review only for an abuse of that discretion. See Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), trans. denied, cert. denied, 126 S.Ct. 1058 (2006). However, whether the admission of the deposition violated Lucas's right to confront the unavailable witness is a question of law; therefore, we will review the trial court's decision de novo. See United States v. Nettles, 476 F.3d 508, 517 (7th Cir. 2007) ("We review de novo a district court ruling that affects a defendant's Sixth Amendment rights."); cf. United States v. Saunders, 166 F.3d 907, 918 (7th Cir. 1999) ("Whether the limitations on cross-examination are so severe as to amount to a violation of the

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[3] Because Lucas committed his crime before the advisory sentencing scheme took effect, the presumptive sentencing scheme applies. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

[4] The presumptive sentence for a Class B felony is ten years. Ind. Code § 35-50-2-5.

Confrontation Clause is a question of law that we review de novo."); Fowler v. State, 829 N.E.2d 459, 465 (Ind. 2005), cert. denied, 126 S.Ct. 2862 (2006) ("Whether a witness is unavailable for purposes of the Confrontation Clause is a question of law.").

B. Admission of the Deposition

The Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Supreme Court determined that the Confrontation Clause bars "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54 (2004). Acosta died before trial, so was unavailable to testify. Acosta's deposition was a "testimonial" statement for purposes of the Confrontation Clause. Howard v. State, 853 N.E.2d 461, 465 (Ind. 2006) ("[W]itness statements made during depositions are generally understood and widely recognized as testimonial."). Therefore, unless Lucas was afforded an adequate opportunity to cross-examine Acosta at the deposition, the admission of the deposition violated Lucas's right of confrontation.

The thrust of Lucas's argument is that he was not afforded an adequate opportunity to cross-examine Acosta because the purpose of the deposition was to determine what Acosta's trial testimony would be, and not to impeach her testimony. As Lucas's counsel argued to the trial court:

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[5] Although Lucas makes no argument regarding the jury's determination that he is an habitual substance offender, because this count is merely an enhancement to the underlying offense, were we to vacate the underlying conviction, we would necessarily vacate the habitual substance offender determination.

> [A]s a defense attorney, uh you take depositions not for (inaudible) testimony at trial, and not to ask the witness every question you would ask at trial, you're more a fact finder. You're trying to figure out, you know as a defense attorney you don't have police officers, investigators, and all the things that the Prosecutor has at his disposal. You're trying to figure out what's this person's (inaudible) background, a little bit about what she might say at trial. You're certainly not gonna exhaust every question you're gonna ask her at trial. In fact, a good defense attorney, and I hope I fit in this category, is gonna save a lot of ammunition for trial. During a pre-trial discovery deposition, you're not gonna play all your cards. You're not gonna explore every issue of her credibility, every issue of her background. And I certainly didn't. . . . [T]hat's not the role of a pre-trial discovery deposition.

Tr. at 87.

We recognize that in Crawford, the Supreme Court stated that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination," 541 U.S. at 62, and that the questioning of Acosta at the deposition hardly rose to the level that would normally be expected at trial. Cf. id. (recognizing that cross-examination allows the defendant "to expose [the witness's] accusation as a lie"). However, our supreme court has already acknowledged that different motivations lie behind a discovery deposition and deposition taken to secure testimony. See Howard, 853 N.E.2d at 468-69. Although our supreme court noted this distinction, it went on to state, "Crawford speaks only in terms of the 'opportunity' for adequate cross-examination." Id. at 470. Our supreme court noted that at pre-trial depositions, "[w]hether, how, and to what extent the opportunity for cross-examination is used is within the control of the defendant." Id. Therefore, our supreme court stated, "[o]nly where a defendant has never had the opportunity to confront and cross-examine a witness does the admission of prior testimony at a subsequent proceeding violate the constitutional

right of confrontation." Id. As Lucas had the opportunity to question Acosta to any extent that he liked, the admission of the deposition did not violate his right to confrontation under Howard.

Lucas does not focus on the fact that he had the opportunity to ask Acosta whatever he wanted to at the deposition, and instead focuses on what he actually asked her. We recognize that in Howard, our supreme court examined the questions asked at the deposition and seemed to conclude that the deposition at issue was actually conducted for testimonial purposes, see id. at 469 ("The deposition lasted approximately two hours and resulted in ninety-two typewritten pages, nearly all of which constitute counsel's examination of [the witness]"), and that it "thus disagree[d] with Howard's claim that he was denied his right to confrontation." Id. However, as discussed above, our supreme court went on to clearly indicate that opportunity is the fundamental inquiry. See id. at 470. Indeed, it addressed the precise issue raised by Lucas and noted that two districts of the Florida Court of Appeals[6] have held that discovery depositions do not afford an adequate opportunity for cross-examination and pointed out that in Indiana, the Rules of Criminal Procedure do not distinguish between discovery and testimonial depositions. Id. at 469 n.7 (citing Ind. Crim. Rule 21; Ind. Trial Rule 30).

We conclude that under Howard, Lucas's right to confront the witnesses against him

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[6] See Lopez v. State, 888 So.2d 693 (Fla. 1st Dist. Ct. App. 2004) ("Being unaware that this deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements, defendant could not have been expected to conduct an adequate cross-examination." (quoting State v. Basiliere, 353 So.2d 820 (Fla. 1977))) ; Belvin v. State, 922 So.2d 1046 (Fla. 4th Dist. Ct. App. 2006), rev. granted. Our supreme court also noted that a different district of the Florida appeals court

was not violated by the admission of Acosta's deposition, as he had the opportunity to ask Acosta any questions he wanted to at the deposition, including those questions tending to discredit or impeach her statements.[7]

II. Sentencing

A. Standard of Review

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

B. Appropriateness of Lucas's Sentence

Lucas does not challenge the eleven-year sentence he received for dealing in a controlled substance, and challenges the appropriateness of only his three-year enhancement for his status as an habitual substance offender.

"A person is a habitual substance offender if the jury . . . finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated substance offense convictions." Ind. Code § 35-50-2-10(e). Lucas was determined to be an habitual substance offender based on two prior convictions for operating a vehicle while

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reached the opposite conclusion. See Howard, 853 N.E.2d at 469 n.7 (citing Blanton v. State, 880 So.2d 798 (Fla. 5th Dist. Ct. App. 2004); Corona v. State, 929 So.2d 588 (Fla. 5th Dist. Ct. App. 2006)).

[7] We recognize the apparent dilemma faced by criminal defense lawyers, who must choose between conducting rigorous questioning attempting to impeach and discredit the deponent's statements, thereby

intoxicated, which qualify as "substance offenses." See Ind. Code §§ 35-50-2-10(a)(2), 9-30-5-1. Generally, after a defendant is determined to be an habitual substance offender, the trial court is required to enhance the sentence for the underlying offense by a fixed term of at least three and not more than eight years. Ind. Code § 35-50-2-10(f). However, where, as in this case, at least three years separate the date on which the defendant was released from probation for the last unrelated offense and the date of the current offense, the trial court has the option to reduce the enhancement to a period not shorter than one year.[8] Id. When reduction is authorized, the trial court may consider aggravating and mitigating circumstances to determine whether and to what extent reduction is warranted. Ind. Code § 35-50-2-10(g).

Lucas's argument that the three-year enhancement is inappropriate focuses on the fact that his previous substance convictions occurred fifteen and eight years prior to his current

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exposing trial strategy, and conducting a fact-finding deposition, preserving impeachment-related questions for trial, thereby running the risk of the witness becoming unavailable before trial.

[8] The trial court has the option to reduce the sentence to a period not shorter than one year if:

> (1) three (3) years or more have elapsed since the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated substance offense conviction and the date the person committed the substance offense for which the person is being sentenced as a habitual substance offender; or
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> (2) all of the substance offenses for which the person has been convicted are substance offenses under IC 16-42-19 or IC 35-48-4, the person has not been convicted of a substance offense listed in section 2(b)(4) of this chapter, and the total number of convictions that the person has for:
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> > (A) dealing in or selling a legend drug under IC 16-42-19-27;
> > (B) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
> > (C) dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2);
> > (D) dealing in a schedule IV controlled substance (IC 35-48-4-3); and
> > (E) dealing in a schedule V controlled substance (IC 35-48-4-4);
> >
> > does not exceed one (1);

Ind. Code § 35-50-2-10(f).

offense. We recognize, as did the trial court, that the aggravating weight of Lucas's criminal history is somewhat attenuated based on the eight-year period between his last offense and the current offense. However, Lucas's criminal history is not insignificant as it consists of twelve misdemeanor convictions and a felony conviction. Also, Lucas has previously had his probation revoked, a circumstance that comments negatively on his character. Cf. Cox v. State, 780 N.E.2d 1150, 1160 (Ind. Ct. App. 2002) (recognizing that a trial court may consider the fact that a defendant recently violated the terms of probation as an aggravating circumstance). We conclude that the three-year enhancement is not inappropriate based upon Lucas's character, as illuminated by his significant, though somewhat removed, criminal history.

In regard to the nature of the offense, there is nothing particularly egregious about Lucas's offense to distinguish it from a garden-variety dealing in a controlled substance. Also, his two previous convictions are for operating while intoxicated, both Class A misdemeanors.[9] Although we certainly do not wish to diminish the damage caused by drunk-driving, we recognize that there are controlled substance crimes that the legislature has deemed to be more serious.[10] E.g., Ind. Code §§ 35-48-4-1 (dealing in cocaine or narcotic drug is either a Class A or Class B felony), 35-48-4-1.1 (dealing in methamphetamine is

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[9] Lucas was also convicted of operating while intoxicated as a Class D felony in 1992. The State apparently used the Class A misdemeanor conviction from 1991 because it, the Class A misdemeanor conviction in 1998, and the current offense all occurred in Wabash County, while the felony conviction occurred in Huntington County.

[10] We point out that a person driving while intoxicated inherently increases the risk that he or she will injure or cause the death of an innocent person. When such harm occurs, the penalty for driving while intoxicated is substantially increased. Ind. Code §§ 9-30-5-4, -5.

either a Class A or Class B felony). However, the trial court also did not order an enhancement at or near the maximum allowed period. We conclude that the three-year enhancement, which is two years above the minimum, but five years below the maximum enhancement authorized by statute, is not inappropriate based on the nature of the offense.

Conclusion

We conclude that Lucas's right to confront the witnesses against him was not violated by the introduction of Acosta's deposition and that the three-year sentence enhancement for Lucas's status as an habitual substance offender is not inappropriate based on the nature of the offense and his character.

Affirmed.

SULLIVAN, SR. J., and VAIDIK, J., concur.